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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 453.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG,
Petitioners,

vs.

SECURITIES & EXCHANGE COMMISSION,
Respondent.

OPENING BRIEF.

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Previous Decisions.

The decision of the Circuit Court of Appeals is contained in 157 F. (2d) 65.

Jurisdiction.

Jurisdiction is conferred in this Court under Title 28, Section 347, U. S. C. Questions of jurisdiction of the SEC to appeal to the Circuit Court will be presented in the brief.

Certiorari was granted by the Supreme Court on November 18, 1946.

Statutes Involved.

The applicable provisions of the Securities Act of 1938, 48 Stat. 74, 15 U. S. C. 77a, *et seq.*, provides as follows:

> "Sec. 22b. In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States Courts within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question, *and any failure to obey such order of the Court may be punished by said Court as a contempt thereof.*" (Italics ours.)

Section 385, Title 28, U. S. C., provides as follows:

> "Sec. 385. (Judicial Code, section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, *and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority.* Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. Sec. 725; Mar. 3, 1911, c. 231, Sec. 268, 36 Stat. 1163.)" (Italics ours.)

Questions Presented.

1. Whether an appeal lies by the Securities and Exchange Commission to the Circuit Court of Appeals from an order of the District Court, rendered July 2, 1946, fining petitioner $50 which was paid, where notice of appeal was filed September 24, 1946, but no application according to Title 28, Section 250, U. S. Codes, for allowance of an appeal was ever made?

2. Whether an appeal lies from an order adjudging a person guilty of contempt of court for failure to produce books and records wherein the District Court in the exercise of its discretion imposed a fine for a violation of its order, which fine was paid?

3. Whether the Circuit Court of Appeals after the payment of a fine can substitute its judgment for that of the District Court and order, in addition to the payment of the fine, that the petitioner be imprisoned until compliance with the District Court's order is carried out?

4. Whether on appeal from the District Court's order adjudging the petitioner guilty of contempt the petitioner may attack the fundamental basis for the original order of the District Court as not being founded upon sufficient evidence?

5. Whether the District Court which had before it a criminal trial, in which nearly all of the matters sought by the subpoena were produced through other witnesses, could take judicial notice of all of those matters in disposing of the controversy?

Statement of the Case.

On June 1, 1943, the District Court of the United States granted an application of the Securities & Exchange Commission and ordered A. W. Young, the petitioner as secretary-treasurer of The Penfield Company, to produce specified items requested in the subpoena. The order was appealed and affirmed on June 30, 1943, by the Ninth Circuit Court of Appeals (143 F. (2d) 746).

A petition for a writ of certiorari was denied (323 U. S. 768). Thereafter, on November 13, 1944, the mandate of the Circuit Court of Appeals issued and was spread upon the minutes of the District Court on December 7, 1944 [R. 5].

Thereafter, on January 16, 1945, the designated officer of the Commission *addressed and mailed a letter to A. W. Young and to Morris Lavine, his attorney*, advising that this officer would call at the office of The Penfield Company at its address, 1427 South Robinson Boulevard, for the purpose of examining the books and records [R. 910].

It appears that both Mr. Young and his attorney were out of the city at the time of the mailing of the letter and the call by the officer(s) of the Securities & Exchange Commission. While it appears that other attorneys' names appear in the notice, it is of record that Francis A. Reilley died and that Morris Lavine was substituted in his place and was the only attorney acting in the matter; and it further appears that neither of the notices were received by the petitioner or by his attorney, nor were either of them served personally or attempted to be served personally, but only by mail. Further, it appears that on the same day at least that the officers called at the office

of The Penfield Company, an order was issued ordering the petitioner Young to show cause why he should not be held in contempt of court.

Francis A. Reilly, who had died and in whose place Morris Lavine was substituted, and other attorneys no longer in any way connected with the case, as shown by the record on appeal.

Morris Lavine at that time had been in Washington, where he had been arguing the case of *Republic of Mexico* v. *Hoffman* (.....), and A. W. Young was out of the state [R. 85].

Upon an affidavit of Mr. Burr the District Court issued an order, returnable on February 5, 1945, to A. W. Young to appear and show cause why he should not be held in contempt of court. The matter was continued to February 26, 1945, at which time Mr. Young appeared. The matter was continued without objection until July 5.

In the same court room prior to that time, there had been an indictment returned entitled *United States of America v. The Penfield Company*, No. 17,230-Crim. [R. 26]. That case had been tried over a period of several weeks, in which A. W. Young, Franklin Black, and The Penfield Company of California were all defendants on charges for violation of the Securities & Exchange Act of 1933 and the use of the mails in a scheme to defraud. During that period of time countless exhibits had been introduced before the trial judge, a list of which are attached as an appendix hereto. The clerk's list of the record of exhibits in that case, has been lodged with this court so that this court may have an idea of what the trial court had before it.

In addition to these exhibits, Henry F. Marlow, a former president of the company, who had jointly been indicted with Young, Black, and the company, became a Government witness. The case against him was dismissed and he produced in evidence nearly all of the documents sought by the Government under the subpoena *duces tecum*. In addition to his testimony, the Government had as a witness K. A. Shropshire of the Bourbon Sales Corporation, and all of the records of the Bourbon Sales Corporation, all of the bottling contracts and practically all of the transactions sought under the subpoena *duces tecum* were introduced.

After the trial had concluded, but before the filing of the notice of appeal, the agents for the Securities & Exchange Commission withdrew all of the exhibits mentioned so that we were not able to have them forwarded either to the Circuit Court of Appeals or to this Court to inspect and see that the order sought by the Securities and Exchange Commission had actually become moot.[1]

The criminal trial ended in acquittal of Young, Black and the Penfield Company. The trial court heard all of the evidence. Thereafter, on July 5, 1945, the defendant A. W. Young submitted affidavits showing that both he and his attorney were out of the city at the time [R. 82], and that neither of them were back in the city until February. Other than the letter there was no showing that Mr. Young had refused to let Mr. Burr see the books and records. All that Mr. Burr stated was that he was going to call, and that is all that he did. The

[1]We think in fairness to the District Court that the Securities and Exchange Commission should forward to this Court all of the records which had been produced in the criminal trial.

petitioner herein objected to predicating a contempt proceeding upon this basis [R. 82].

The Court, after examining the affidavit of defendant Young, stated:

> "The affidavit of the defendant Young indicates that he was absent from the city from January 11 to February 3, so the question now is whether or not his mere absence from the city is sufficient to exculpate him from the order of the Court.[2]
>
> I think that the order is pretty definite, and he should have made the books and records available to Mr. Burr, and even though he were absent from the city I think he should have made some provision so that the examination could have been had, because the order to produce the books and records was made in the alternative, to examine them at their office as an accommodation to the defendant in order to prevent him from having to physically bring the books and papers to the office and interrupt his business. I think the order is definite enough that it should have been obeyed.
>
> The question now is whether or not, as I have indicated, his absence from the city is sufficient to excuse him. I don't believe that it is, Mr. Lavine.

---

[2]Efforts have been made to locate the affidavits which were served upon opposing counsel and given to the court, but they seem to have been lost from the files. However, the record shows that the court had the affidavits before him.

I think that he should have provided some means or some person so that they could have been available.

* * * * * * * *

The Court: That will be the order of the Court, that he is guilty of contempt.

Are you ready for sentence?

Mr. Lavine: Yes Your Honor.

The Court: Come forward, Mr. Young.

Mr. Young: Might I say a word, Your Honor?

The Court: I think you had better talk to your counsel.

Mr. Lavine: Your Honor, the defendant wishes to point out to Your Honor that in connection with the matter he was not aware of the time at the time that the mandate came down as to what further proceedings might be had in connection with the matter and he was trying to make a living and went out of the city.

The Court: He had good counsel and if he had consulted him when the mandate came down I think he would have been advised of what he was obliged to do.

Mr. Lavine: Unfortunately I went out of the city too, Your Honor so we were both out of the city. I want Your Honor to take that into consideration.

The Court: Very well. The order will stand that the defendant be adjudged guilty of contempt.

Do you have anything to say in connection with the disposition of this matter Mr. Cuthbertson?

Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a

look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

* * * * * * * * *

The Court: The Court can take judicial notice of its own books and records, * * *.

The judgment and sentence of the Court is that the defendant pay a fine of $50 and stand committed until paid." [R. 83-87.]

The petitioner paid his fine into the United States Treasury the next day.

The Securities and Exchange Commission filed an appeal from this order on September 24, 1945. However, it did not ever make application for allowance of an appeal as provided by Section 230 of Title 28, U. S. Codes.

The Circuit Court reversed (one judge dissenting) the order of the District Court, ordering that in addition to the fine that Young be imprisoned to compel his obedience to the order to produce the documents in question. "If he complies, or shows compliance is impossible, he must be released." [R. 98.]

Specification of Errors.

I.

The Circuit Court of Appeals erred in holding that it had jurisdiction to entertain the appeal.

II.

The Circuit Court of Appeals erred in endeavoring to impose its judgment in place of that of the District Court.

III.

There was no sufficient predicate for the District Court's order adjudicating the petitioner in contempt.

IV.

There was no showing on the part of the Commission as to a wilful refusal to obey the District Court's order on the date alleged, or that a demand had been made of Mr. Young and refused by him or anyone acting under his authority or supervision.

V.

The District Court has wide discretion in imposing its penalties in contempt proceedings. The Statute gives the District Court the alternative of either fine or imprisonment. The payment of the fine exhausts the jurisdiction of the Court to proceed any farther.

ARGUMENT.

I.

A.

The Circuit Court of Appeals Was Without Jurisdiction to Entertain the Appeal in the Absence of an Application for Allowance of an Appeal.

There was no application for allowance of an appeal as required by Title 28, Sec. 230, U. S. C.

The only proceeding taken by the Securities and Exchange Commission (appellants below) was a notice of appeal filed in the District Court. This was not a compliance with Section 8c of the Jurisdictional Act of February 13, 1925 (454, Title 936, 940, C. 229, Jan. 31, 1928, 45 Stat. *et seq.*, 54, C. 14; 28 U. S. C. A., Sec. 230) or with the requirements of Title 28, Sec. 230, U. S. C.

Nye v. U. S., 313 U. S. 33; 85 L. Ed. 1172;

McCrone v. U. S., 307 U. S. 61, 83 L. Ed. 1108;

Steevler v. U. S., 319 U. S. 39, 87 L. Ed. 1197;

Fox v. Capital Co., 299 U. S. 105, 108, 81 L. Ed. 67.

B.

The Circuit Court of Appeals Had No Jurisdiction Under Any Circumstances to Pass Upon the Questions Involved, Since the Statutory Requirements Had Not Been Complied With.

Jurisdiction of the Federal Courts to hear or entertain a case or to hear or entertain an appeal is governed by the granting or withholding of power by Congress by

Congress itself, and is not enlarged or changed by any rule of Court.

Yakus v. U. S., 321 U. S. 414, 88 L. Ed. 1834;
Bowles v. Willingham, 321 U. S. 503, 88 L. Ed. 892.

C.

If the Appeal Be Deemed Criminal Then, as Punishment for Violation of the Court's Order, Then the Time Had Long Passed When Notice of Appeal Could Be Filed. Under the Rules as Then Existed This Was Five Days After Judgment.

Criminal Appeals Act, 18 U. S. C. A. 682;
Rules of Criminal Procedure After Verdict;
U. S. v. Hark, 320 U. S. 531, 88 L. Ed. 290.

In any event no exception was taken by the SEC. In fact it cannot be said that its attitude arose even to the dignity of an objection. As the payment of the fine was stayed 24 hours no effort was made during this period to get a different order. There was thus a complete waiver on the part of the government if it be said to have any rights.[3]

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[3]The order of the Circuit Court was erroneous also because jurisdiction had been exhausted in the District Court by the failure of the counsel for the SEC either to object to the order of the Court or take an exception from the District Court's order. Actually, all that transpired after the court was about to pronounce judgment, the attorney for the SEC said, Mr. Cuthbertson: "So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose

D.

The Circuit Court of Appeals Erred in Endeavoring to Impose Its Judgment in Place of That of the District Court.

The District Court is given jurisdiction under Title 28, Sec. 385, to impose punishment for a violation of its orders. Its discretion is inherent in the District Court and is limited only by the statutes and applicable decisions.

Nye v. U. S., 313 U. S. 33, 85 L. Ed. 1172.

If it imposes punishment by way of a fine, its judgment is punitive or criminal, and there then arises a question as to whether under the facts of this case the appeal was timely in any event in the light of this Court's decision in *Steever v. U. S.*, 319 U. S. 39, 87 L. Ed. 1197, and Title 18, Section 682, Criminal Appeals Act.

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would be in connection with or so long as he refuses to produce his books and records for our inspection."

The Court: "I don't think that I am going to be disposed to do anything like that. . . ."

The Court, after imposing the fine with an order that the defendant was to stand committed until paid, stayed the execution of the fine until the following day. No exception was noted by the attorneys for the Government nor was any application made to the Court to impose a different judgment than the one which it had imposed. This constituted a failure to assert any rights, and in fact, constituted a waiver of any claimed rights. The Government, equally with defendants, may waive its rights, which surely, waivers do not exist on one side alone. This Court has held that such fundamental rights as the right to be represented by counsel are waived by a failure to assert them.

This Court has also asserted that consent to an inspection constitutes a waiver of constitutional rights against search and seizures.

Zap v. United States, 90 L. Ed. 327 U. S.

II.

The Circuit Court of Appeals Erred in Holding That It Had Jurisdiction to Entertain the Appeal After the Defendant Had Paid the Fine.

This Court has held in civil cases that the order of the District Court relating to a contempt proceeding is not an appealable order. The payment of the fine in any event exhausted the jurisdiction of the District Court and of all other courts.

In re Bradley, 318 U. S. 50; 87 L. Ed. 608;

Ex Parte Lange, 18 Wall. (U. S.), 163, 176, 21 L. Ed. 872, 878.

The powers to impose punishment for contempt which are conferred in the Securities and Exchange Commission Act upon the District Court must be read in connection with Title 28, Sec. 385, with reference to contempt procedings. That Statute gives the District Court jurisdiction to either impose a fine or to commit a person to jail. It does not give authority to do both; nor does the Statute confer the power upon the Securities and Exchange Commission to impose the kind and type of punishment which the Securities and Exchange Commission desires.

If the Securities and Exchange Commission, or any other Commission, had that authority, it would make the District Court a mere rubber stamp for the Commission to impose its specific order.

Just as Congress has not given the power to Commissions to hold hearings to enforce its subpoenas (see *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 86 L. Ed.

895), so Congress has not seen fit to give the Commission the power to suggest the kind or type of punishment which might be imposed in a particular case. That power has been vested in the District Courts of the United States, who have full opportunity to get all of the facts, hear all of the evidence, and determine what law and justice require under the particular facts of the case. That was done in this case. The Court had before it everything that might aid it in the determination of the proper punishment. The Court had heard the first proceeding on the application for the subpoena; had heard the criminal trial and saw countless witnesses; had heard all of the evidence involved in that proceeding, and thereafter had heard the contempt proceeding. It imposed a judgment accordingly. That judgment was imposed in accordance with its powers under Title 28, Sec. 385. Having done so it exhausted its jurisdiction.

Nor was there any right of appeal by the Commission from the exercise of the District Court of its admitted jurisdiction. The Commission had sought the District Court's order. *It was the order of the District Court, not that of the Commission, out of which the contempt arose.* That was the authority in the Act granted by Congress. The Commission seeks to transfer that authority from the Court to itself, but if that authority is to exist the application should be made to Congress and not to the courts.

III.

There Was No Sufficient Predicate for the District Court's Order Adjudicating the Petitioner in Contempt.

As a predicate for an order adjudging a person in contempt, we deem the following to be essential:

1. A lawful order of the Court.
2. Notice of personal service of the order of the Court.
3. Lawful disobedience of the orders of the Court after notice.
4. Notice of and a hearing thereon.

1. Lawful order of the Court:

That the Court had issued a lawful order permitting an inspection of the books and records is complete, no doubt; but the date of the original order was June 1st, 1943. The date fixing the new order of inspection was not fixed by any order of the court but was fixed by a letter of Charles R. Burr, Assistant Regional Administrator of the Securities and Exchange Commission, R-9, 10. In so far as the date of January 24, 1945, was concerned, there never was any order *of the Court* fixing that date as the date to permit inspection nor was there any showing that this letter had ever been received by Mr. Young or by his attorney. It was not served personally. The record affirmatively shows on the other hand that Mr. Young was out of the City from January 11 to February 3 [R. 83] and that his attorney, Morris Lavine, who was then his only attorney of record, was out of the city in Washington, D. C., concerning a matter before the Supreme Court of the

United States. [R. 85.] There is nothing in the affidavit of Mr. Burr as to what address he called at in connection with the Penfield Company of California [R. 7] or who he saw or talked to or that he ever made a demand personally upon Mr. Young.

Rule 45(C) provides the method of service of a subpoena as follows:

> "A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."

Since the order of June 1st, 1943 to compel the obedience to a subpoena *duces tecum* had long passed, the new order and date should have been fixed by an application to the trial judge who issued the original order and should have been personally served upon the respondent. Without such a procedure and without such personal service, it is respectfully submitted that there was under no circumstances a sufficient predicate for the finding of an order for contempt or for the subsequent order of the Circuit Court "requiring Young's imprisonment to compel his obedience to the order to produce the documents in question."

We are not foreclosed in raising these matters in defense against an order of imprisonment.

U. S. v. Curtis Wright Export Co., 299 U. S. 304, 81 L. Ed. 255;

Langnes v. Green, 282 U. S. 535, 75 L. Ed. 520.

IV.

There Was No Showing on the Part of the Commission as to a Wilful Refusal to Obey the District Court's Order on the Date Alleged, or That a Demand Had Been Made of Mr. Young and Refused by Him or Anyone Acting Under His Authority or Supervision.

A contempt has been defined as "wilful disregard or disobedience of public authority."

Melton v. Com., 160 Ky. 642, L. R. A. 1915B, 689;

Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853.

Intent to commit contempt is usually necessary.

State ex rel. Webb v. District Ct., 37 Mont. 191, 195.

There certainly could be no intent to commit a contempt where no order of the Court was served in connection with the new date or where there had been no personal service or where the petitioner was out of the City and had never received any prsonal service or notice and there was no showing that he had refused to obey the order.

V.

The District Court Has Wide Discretion in Imposing Its Penalties in Contempt Proceedings. The Statute Gives the District Court the Alternative of Either Fine or Imprisonment. The Payment of the Fine Exhausts the Jurisdiction of the Court to Proceed Any Farther.

Title 28, Section 385, gives the District Court wide discretion in imposing its penalties. It would appear that the Court's determination as to the character of the proceedings for contempt determined the proceedings.

State ex rel. Rodd v. Verage, 177 Wis. 295, 187 N. W. 830, 23 A. L. R. 491.

The purpose of the punishment rather than the character of the act punished determines whether the proceeding to punish is for a civil or a criminal contempt.

Lamb v. Cramer, 285 U. S. 217, 76 L. Ed. 715.

Here the Court imposed a fine. It does determine that it wished to impose a punishment. When he did so, and when the fine was paid, the Court's jurisdiction was exhausted.

In Re Bradley, 318 U. S. 50, 87 L. Ed. 608.

The Circuit Court of Appeals in its decision ordered the District Court to impose another order or judgment in addition to the judgment already pronounced by the District Court. This was erroneous for three reasons:

1. The payment of the fine in the District Court exhausted jurisdiction of the Court.

In re Bradley, 318 U. S. 50, 87 L. Ed. 608, Title 28, Sec. 385 U. S. C., which only authorizes the Court to impose either a fine or imprisonment, and not both.

2. The Circuit Court of Appeals was without power to tell the District Court what kind or character of punishment should be imposed for a violation of its (the District) Court's order.

This was not changed by calling the case a civil contempt proceeding or a proceeding to enforce an order of the Securities and Exchange Commission. Congress has given that function to the District Court alone.

3. The District Court in reaching its judgment as to the punishment that it wished to make with reference to the matter had before it the entire case, both civil and criminal, and was best in a position to exercise its judgment regarding the character or kind of punishment that it wished to impose for a violation of its order.

This it did. That ended the matter.

For each and all of these reasons, it is respectfully urged that the judgment of the District Court be affirmed and the judgment and order of the Circuit Court of Appeals be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.